

CATCHWORDS

IMMIGRATION - review of decision of Immigration Review Tribunal refusing to grant a spouse (after entry) permit, class 801 - whether Tribunal committed error of law in determining there was no genuine and continuing spousal relationship at date of application, pursuant to Migration Regulations 1989, reg.135.

ADMINISTRATIVE LAW - review of decision of Immigration Review Tribunal - role of the court in exercising the power to review administrative action - whether error of law committed in construing the words "genuine and continuing relationship" under reg.135, Migration Regulations, 1989.

Migration Act 1958 (Cth)
Migration Regulations 1989

Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 136 ALR 481

Minister for Immigration, Local Government and Ethnic Affairs v Dhillon, FCA/FC, 8 May 1990, unreported.

R. v Cahill [1978] 2 NSWLR 453

MAHFOUD v MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS & ORS
NG 888 OF 1995

Sackville J.
Sydney
31 October, 1996

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

)
) No. NG 888 of 1995
)

BETWEEN:

GORGES MAHFOUD
Applicant

AND:

MINISTER FOR IMMIGRATION AND ETHNIC
AFFAIRS
First Respondent

RICHARD PHILLIPS, sitting as a
member of the Immigration Review
Tribunal
Second Respondent

KIM ROSS, sitting as a member of
the Immigration Review Tribunal
Third Respondent

CORAM: SACKVILLE J.
PLACE: SYDNEY
DATE: 31 OCTOBER, 1996

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The application for review be dismissed.
2. The applicant pay the respondent's costs in the proceedings.

NOTE: Settlement and entry of orders is dealt with in Order 36
of the Federal Court Rules.

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REASONS FOR DECISION

Introduction

The applicant seeks review of a decision of the Immigration Review Tribunal, made on 1 November 1995, refusing the grant of a spouse (after entry) permit, class 801. The application as filed invoked the jurisdiction conferred on the Court by s.5 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the "ADJR Act"), s.39B of the Judiciary Act 1903 (Cth) and s.476(1) of the Migration Act 1958 (Cth) (the "Migration Act").

Ultimately, the applicant limited his application for review to the ground specified in s.476(1) (e) of the Migration Act, which

provides for review on the ground of error of law. He did so on the basis that the Tribunal's decision was a "judicially reviewable decision" for the purposes of the Migration Act: see s.475(1)(a). The Migration Act confers jurisdiction on the Court with respect to judicially-reviewable decisions: s.486.

Section 476(1) of the Migration Act permits an application to be made to this Court for review of a judicially-reviewable decision on any one of a number of specified grounds. Paragraph (e) is in the following terms:

"(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision".

Section 476(2) provides as follows:

"The following are not grounds upon which an application may be made under subsection (1):

(a) ...

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power."

The applicant ultimately did not rely on the jurisdiction conferred by the ADJR Act or by the Judiciary Act. He took this course because of s.485(1) of the Migration Act. This sub-section provides that, in spite of any other law, including s.39B of the Judiciary Act, the Court does not have any jurisdiction in respect of judicially-reviewable decisions other than the jurisdiction provided by Part 8 (which includes ss.475 and 476),

or by s.44 of the Judiciary Act (which deals with remitter of cases by the High Court). The parties accepted that Part 8, including s.485, applied to the application to review the Tribunal's decision.

The Issue Before the Tribunal

The applicant is a citizen of Syria. In substance, he claims to be entitled to permanent residence in Australia on the basis that he married Rema Karam in a ceremony that took place on 11 March 1990 at the St Nicholas Antiochian Church at Punchbowl, a suburb of Sydney. His application for a class 801 entry permit was made on 26 March 1990. The application was refused on 13 September 1991 and on 14 April 1992 the Migration Internal Review Office refused to set aside or alter the earlier decision.

On 14 May 1992, an application was made to the Tribunal for review of the decision to refuse an entry permit. On 3 March 1993 the Tribunal affirmed that decision. On 22 September 1993, after proceedings had been instituted in this Court seeking review of the Tribunal's decision, the matter was remitted to the Tribunal by consent. The orders provided, *inter alia*, for the applicant to have the opportunity to call further oral evidence and tender further documents. In the event, the Tribunal took oral evidence over four days from a number of witnesses and received a considerable volume of documentary material.

Between the dates of the two Tribunal decisions, the Migration Act

was substantially amended by the Migration Reform Act 1992

(Cth), parts of which came into force on 1 September 1994. Regulation 23 of the Migration Reform (Transitional Provisions) Regulations specifies the position in relation to an application for an entry permit which was made before 1 September 1994, but had not been finally determined by that date. Where the application was for a permanent entry permit, the application is taken to be an application for a transitional (permanent) visa: reg.23(2)(b). The application is to be decided according to the criteria that applied to the entry permit for which application was made: reg.23(3).

In order to be granted a class 801 entry permit, the applicant had to satisfy the criteria contained in reg.135 of the Migration Regulations, as it stood at the time the original application was made (26 March 1990): Migration Regulations 1989, Sched.3, Part 2, item 2; reg.34A. The parties were agreed, both before the Tribunal and this Court, that reg.135 at the relevant date was in this form:

"The additional criteria in relation to a spouse (after entry) entry permit are the following criteria:

- (a) the applicant is the spouse of an Australian citizen or an Australian permanent resident;
- (b) the relationship between the spouses is a genuine and continuing relationship;
- (c) the applicant is nominated by the other spouse;
- (d) the applicant meets the requirements of at least one of the paragraphs of subsection 47(1) of the Act."

The term "spouse" was defined, relevantly, as follows (reg.2):

"(a) a person who has entered into a marriage recognised as valid for the purposes of the Act, where:

- (i) the marriage has not been ended by divorce or the death of one of the parties; and
- (ii) the parties are not living separately and apart on a permanent basis..."

Regulation 135 was amended in April 1991. One effect of the amendment was that the requirement of a "genuine and continuing relationship" must be satisfied at the date the decision is made. However, the Tribunal accepted that reg.135 in its earlier form required the applicant only to establish that the relationship between the spouses was "a genuine and continuing relationship" at the date of the application. Accordingly, the Tribunal identified the question for decision as follows:

"Was this couple in a genuine and continuing spouse relationship when the original application was lodged on 26 March 1990?"

Undisputed Facts

The Tribunal heard evidence from a substantial number of witnesses. The credibility of many of these witnesses was attacked in the course of the proceedings. However, some facts were not substantially in dispute and it is convenient to refer briefly to them here.

In October 1989, the applicant, then aged 25, applied for an Australian visa, based on what was said to be his relationship as

the fiancé of an Australian citizen, Ms Makhoul. At that

stage the applicant had completed or was near completion of his course of legal studies at university in Syria. On 2 January 1990, the applicant was granted a visa allowing him to enter Australia and remain for three months. He was informed that he would be granted permanent residence provided that he married within three months of entering Australia. In the meantime, unknown to immigration authorities, Ms Makhoul had married another person.

The applicant arrived in Australia on 14 January 1990. According to the applicant, he met Ms Karam, then aged 21, shortly after hearing that he had been jilted by his fiancée. He had not known Ms Karam before that meeting. They met on several occasions thereafter, whereupon the applicant asked Ms Karam to marry him. On 4 February 1990 a small party was held to celebrate their engagement.

The circumstances of the wedding ceremony of 11 March 1990 were the subject of conflicting evidence. However, a short ceremony took place between the applicant and Ms Karam on that date and a marriage certificate was completed and signed at the time. The applicant and Ms Karam did not live together in the same house after the ceremony.

On 22 April 1990, a second marriage ceremony took place between the parties. This was a more elaborate church ceremony at which a large number of people were present. After the ceremony the applicant and Ms Karam lived together. Ms Karam gave birth to

the applicant's child in February 1991.

The applicant and Ms Karam separated at about the time the baby was born, in circumstances described by the Tribunal as acrimonious.

The Tribunal's Reasons

The Tribunal observed that it had focussed for the most part on the situation at the time of the ceremonies of March and April 1990. It recorded that, in general, it had resisted attempts to rely on evidence of matters occurring months or even years after those ceremonies. The Tribunal explained its approach as follows:

"This is a matter in which two young people from a community with strong views on the sanctity of marriage were married and whose very public wedding was followed after not a great length of time by a very acrimonious separation and divorce. In such cases, it is not unlikely that both parties will tend to 'rewrite' history through their own perspective and put a colour on events which to some extent puts them in a better light and their former spouse in a worse light. The Tribunal hastens to say that such behaviour does not, of course, necessarily amount to dishonesty. Similarly, friends, relatives and associates of both parties will frequently, after a relationship founders, tend to 'factionalise' in support of one party or another. There is clear evidence, both express and implicit, that this has happened in this case. Again, when this happens, evidence of fault or blame is often not particularly valuable."

The Tribunal then pointed to the difficulty of making findings on the basis of the controverted evidence of witnesses who had taken sides in such a bitter dispute. Their evidence was contrasted with the contemporaneous records of a doctor, who gave

evidence that Ms Karam could not have had intercourse with the applicant prior to a consultation which took place on 14 April 1990. The relevance of that evidence will appear shortly.

The Tribunal examined a number of disputed factual issues by "grouping them...around a series of chronological steps". These were

- the applicant's circumstances and intentions prior to arriving in Australia;
- the series of events leading up to the ceremony of 11 March 1990 and the reasons for that ceremony;
- the "purported wedding" of 11 March 1990; and
- the circumstances of Ms Karam and the applicant between 11 March 1990 and 26 March 1990.

The Tribunal also considered when the applicant and Ms Karam first had sexual relations. This was said to be an important indicator of whether a genuine and continuing spousal relationship existed and was also important in assessing the credibility of certain witnesses.

After detailed consideration of conflicting evidence, the Tribunal made a number of findings. It found that the ceremony of 11 March

1990 was held on that date because the applicant, Ms

Karam and their respective families had believed that unless he was married before 14 April 1990 (three months after entering the country) the applicant would have been required to leave Australia.

The Tribunal made further findings in relation to the ceremony as follows:

"The Tribunal finds that the intention of Ms Karam and Mr Mahfoud in relation to the ceremony on 11 March 1990 was not to bring about a relationship of husband and wife between Mr Mahfoud and Ms Karam, although it may have been done in the belief that such a relationship would later commence. The purpose of the ceremony in the eyes of Ms Karam and Mr Mahfoud was to satisfy the authorities that Mr Mahfoud had complied with the conditions of his visa and thereby to bring about the consent of the authorities for Mr Mahfoud to remain in Australia."

The Tribunal summarised its findings as to the extent of the relationship between the applicant and Ms Karam as at 26 March 1990:

"The Tribunal is not satisfied that as at 26 March 1990 Mr Mahfoud and Ms Karam had made a mutual commitment to a shared life as husband and wife to the exclusion of others. The couple were not having, and had not had, sexual intercourse. They were not living together. Their income and expenditure was not joint. They were not publicly recognised as man and wife. As far as Ms Karam was concerned, the commitment was still contingent. As far as Mr Mahfoud was concerned, the marriage was not yet complete. The couple had undergone a perfunctory ceremony calculated to ensure that Mr Mahfoud could remain in Australia, and were planning a public wedding ceremony."

The Tribunal affirmed the decision refusing the grant of a spouse (after entry) permit to the applicant.

The Applicant's Submissions

Mr Smark, who appeared on behalf of the applicant, submitted that the Tribunal had erred by incorrectly applying the law to the facts as found. The error of law relied upon was, however, somewhat elusive. Mr Smark did not dispute that the Tribunal had asked itself the correct question, namely, whether the relationship between the applicant and Ms Karam was "a genuine and continuing relationship" as at 26 March 1990. Nor did he dispute that it was appropriate to read that phrase as referring to a genuine and continuing spousal relationship. Regulation 135 is concerned with the relationship between persons who are married or who are living together as de facto spouses, and reg.135(b) refers specifically to the relationship between the spouses. Indeed, Mr Smark accepted that the Tribunal was entitled to make the findings of fact which it made and that those findings could not be challenged on the application for review.

Notwithstanding these concessions, Mr Smark submitted that the Tribunal must have misapplied the test stated in reg.135. He did not identify the incorrect test the Tribunal in fact applied. He did suggest, however, that the Tribunal had paid too much attention to both the traditional model of a marital relationship and to the parties' reasons for participating in the ceremony of 11 March 1990. Mr Smark pointed out that the authorities have recognised that marital (or spousal) relationships cannot be easily categorised and that spouses can have an almost limitless variety

of motives for marrying. In *R. v Cahill* [1978] 2 NSWLR

453 (NSW CCA), a criminal case, Street CJ said this (at 458):

"Quite apart from matters of religious teaching, it is known that marriages are at times contracted for reasons falling short of the more generally recognised purposes of entering into that relationship. In England in bygone days there were instances of celibate marriages being contracted for the purpose of affecting rights of inheritance of titles. The same situation exists both here and elsewhere in relation to marriages affecting rights of property succession. At times, marriages were or are entered into in connection with legitimization of existing or imminent issue of a since-terminated intimate relationship. The purposes and motives, equally as the hopes and anticipations, affecting two people when they enter into a marriage, are susceptible of too wide a variation to render it possible for the criminal law to classify some as offending, and the others as according with what is meaninglessly described as 'community expectation', in so far as this may travel beyond the specifically prescribed concomitants of a marriage."

In *Minister for Immigration, Local Government and Ethnic Affairs v Dhillon*, FCA/FC, 8 May 1990, unreported, the Full Court observed (at 10) that

"people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc. as according to what may be described as 'community expectations'. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others."

Mr Smark further submitted that the Tribunal had paid insufficient attention to events occurring after the second

ceremony, held on 22 April 1990, since (as he contended) those events necessarily shed light on the nature of the parties' relationship as at 26 March 1990. Mr Smark submitted that the purpose of reg.135 was to prevent people gaining permanent residence by sham marriages. The uncontested evidence was that the applicant and Ms Karam were parties to a genuine marital relationship and, therefore, the applicant was not intended to be caught by the regulation.

Was There an Error of Law?

In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 136 ALR 481 (H Ct), the joint judgment of Brennan CJ, Toohey, McHugh and Gummow JJ emphasised the limited role of the Court in exercising the power to review administrative action. Their Honours cited with approval (at 491) the observation of Brennan J in *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1, at 35-36:

"The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

In a case such as the present, care must be taken to ensure that the Court intervenes only to correct an error of law, and that it

does not use its powers to review the merits of the Tribunal's

decision on the facts.

In *Minister v Wu* the issue was whether the Minister's delegate correctly applied the test for determining whether the applicant was entitled to be regarded as a refugee. The delegate, on two separate occasions, had articulated the correct test. In the language of the joint judgment (at 490) it was only some phraseology in between the correct statements of the tests which provided the basis for an argument that the delegate had slipped from an assessment of "real chance" of persecution (as the test required) to an assessment of the probabilities (which would have been incorrect). The joint judgment cited with approval observations of the Full Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 (FCA/FC), at 287, that a court should not construe reasons for a decision "minutely and finely with an eye keenly attuned to the perception of error".

In *Pozzolanic* the Full Court made some other important observations that are relevant to the present case. Their Honours said this (at 286-287):

"The appealable error of law must arise on the facts found by the Tribunal or must vitiate the findings made or must have led the Tribunal to omit to make a finding it was legally required to make. A wrong finding of fact is not sufficient to demonstrate error of law: *Waterford v Commonwealth* (1987) 164 CLR 54 at 77-78. Where the decision of the Tribunal involves matters of fact and degree, then provided it applies correct principles of law, no appeal will lie: *Commissioner of Taxation v Brixius* (1987) 16 FCR 359 at 365.

The limits within which the jurisdiction is conferred

require that it be exercised with restraint. Only in exceptional circumstances should the decision of the Tribunal not be the final decision: *Blackwood Hodge (Australia) Pty Ltd v Collector of Customs (NSW)* (1980) 47 FLR 131 at 145 (Fisher J); *Commissioner of Taxation (Cth) v Cainero* (1988) 88 ATC 4,427 (Foster J). As the Full Court said in *Repatriation Commission v Thompson* (1988) 9 AAR 199 at 204:

'...the nature of the task of this Court is clear. It is to leave to the tribunal of fact decisions as to the facts and to interfere only when the identified error is one of law.'

This translates to a practical as well as principled restraint."

The judgment went on to point out (at 288) that when a statute uses words according to their ordinary meaning, and the question is whether the facts as found fall within those words, the question whether they do or do not is one of fact, provided that it is reasonably open to find that the facts do fall within the statutory language.

In the present case, as the Tribunal recognised, its task was to determine whether, as at 26 March 1990 (not some later date), the relationship between the spouses was a genuine and continuing relationship. There is nothing in the language or reasoning of the Tribunal to suggest that the Tribunal did not undertake the task it set for itself. In my opinion, the criticisms made by Mr Smark of the Tribunal's reasoning processes amount to attacks on the findings of fact. For example, the contention that the Tribunal paid too much attention to the parties' reasons for participating in the ceremony of 11 March 1990 is, in substance, a criticism of

the finding that the parties had not, by 26 March

1990, made a mutual commitment to a shared life. Similarly, the suggestion that insufficient attention was paid to the events after the second ceremony of 22 April 1990 amounts to an attack on the same finding. Even if the criticisms were made out, they would not establish that the Tribunal had made an error of the kind specified in s.476(1)(e) of the Migration Act.

I am also of the opinion that the submission that the Tribunal applied an unduly narrow or idiosyncratic test of a spousal relationship cannot be sustained. As the reasons record, the Tribunal was referred to *R. v Cahill* and *Minister v Dhillon*. Indeed, it made findings in terms of the test suggested in the latter case. The Tribunal was clearly conscious of the principles articulated in those cases.

It must be remembered that the Tribunal's findings were not confined to the issue of the intentions of the applicant and Ms Karam in relation to the ceremony of 11 March 1990. A finding on that issue, as Mr Smark accepted, was relevant to the ultimate question correctly identified by the Tribunal. The Tribunal also found that the applicant and Ms Karam did not live together after the ceremony; that their relationship had not been consummated by 26 March 1990; that they were not publicly recognised in their community as married before the ceremony of 22 April 1990; and that until that time neither regarded their marriage as complete. These findings reinforce the conclusion that the Tribunal did not apply an inappropriate test of a genuine and continuing spousal

relationship.

In any event, Mr Smark did not suggest that the words used in reg.135(b) bare anything other than their ordinary meaning.

In my opinion, it was clearly open to the Tribunal, having regard to its findings of fact, to hold that the applicant and Ms Karam were not parties to a genuine and continuing spousal relationship as at 26 March 1990. In this respect, Mr Smark's argument rested heavily on the proposition that the applicant and Ms Karam had clearly been in a genuine and continuing relationship after 22 April 1990. However, the issue was not whether, as at 26 March 1990, it was likely that the parties would enter such a relationship in the future. The question was whether the spousal relationship was genuine and continuing as at that date.

Mr Smark might well be correct in suggesting that reg.135 was aimed principally at sham marriages. But the Tribunal's task was to apply the language used in reg.135 to achieve that objective. That is what the Tribunal did.

Additional Matters

I mention two other matters. First, it might be said that, having regard to subsequent events, the applicant was unfortunate that the relevant date for the purposes of reg.135(b) was the date of his application. But if reg.135 in its amended form had been in force, the applicant would still not have been able to satisfy the requirement in reg.135(b), since at the date of the decision his marriage had ended.

Secondly, for a variety of reasons, a period of over six years has now elapsed since the date the applicant sought an entry permit. He is the father of a child who was born and lives in Australia. That child is now five years old. Perhaps these are factors that can be taken into account on some further application the applicant might be able to make. They are not, however, matters that bear on the present proceedings.

Conclusion

The application for review should be dismissed. The applicant must pay the Minister's costs.

I certify that this and the preceding 16 pages are a true copy of the Reasons for Judgment of the Honourable Justice Sackville.

Associate:

Dated:

Heard: 24 October, 1996

Place: Sydney

Decision: 31 October, 1996

Appearances: Mr K. Smark appeared on behalf of the applicant.

Mr N.J. Williams, instructed by the Australian Government Solicitor, appeared on behalf of the first respondent.

